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Lester Harris

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RECOGNITION OF THE HOLY SEE

By

LESTER HARRIS*

History of Relations Between the United States and the Holy See.

Despite the fact that the United States has recognized the Holy See in its temporal capacity in the past, President Franklin Roosevelt was bitterly denounced for having appointed a personal observer to the Vatican in 1939-1940. "The appointment was unconstitutional"; "It was a commingling of Church and State".

In the field of foreign relations, the President of the United States governs supreme—treaties only excepted.

"It (control of foreign relations) is a power which inheres to him as the sole organ under the constitution through whom our foreign relations and diplomatic relations are conducted."

"Why? Because the President, through the Ambassadors, Ministers, Counsels and all the agencies of government, explores sources of information everywhere. It is his business to know whether anything has occurred," etc.¹

Not only is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. In the field of negotiation, the Senate cannot intrude and Congress itself is powerless to invade it.²

International law is part of the law of the land. Mr. Justice Gray, in the case of *The Paquete Habana v. U.S.*, 176 U.S. 677-694, in a majority opinion, held: "International law is part of our law, and must be ascertained and administered by the courts of justice as often as questions of right are duly presented for their determination."

Or, as Chief Justice Marshall held in the *Nereide*: "That in the absence of any Act of Congress to the contrary, the Court is bound by the Law of Nations, which is part of the law of the land."³

*B.S., Bucknell, 1911; LL.B. Stetson, 1928; City Attorney, Winter Garden, Florida; Contributor to Dickinson Law Review, Florida Bar Journal and University of Miami Law Quarterly.

¹ Speech, Sen. Spooner; For. Rel. Comm., Cong. Rec., Vol. 40, P. 2; pp 1418-19.

² U.S. v. Curtis Wright Exp. Corp., 299 U. S. 304.

³ 9 Cranch 388.

Under International Law, our government has always interchanged special ambassadors, ambassadors and ministers with sovereign states and with semi-sovereign and part-sovereign states, as well.

Today, the Holy See has all the attributes of a sovereign nation to-wit:

- A. "There must be a people in sufficient number to maintain itself."
- B. "There must be a fixed territory which the inhabitants occupy." (The area amounts to 108.7 acres—thirteen buildings have extra-territorial status. *World Almanac 1946*—page 375.)
- C. "There must be an organized government, expressive of the sovereign will within the territory and exercising in fact, supremacy therein." In the field of dipolmacy the Holy See controls one of the most efficient Departments of Foreign Relations in the world today.
- D. "There must be an assertion of right through governmental agencies to enter into relations with the outside world. The exercise of this right need not be free of external restraint. Independence is not essential. It is the possession and the use of the right to enter into foreign relations which distinguishes States of International Law from the larger number of political entities which are wholly lacking in such a privilege. It illustrates the difference between Ecuador and Alaska, and between Cuba and South Carolina."⁴
- E. "The inhabitants of the territory must have attained a degree of civilization such as to enable them to observe those principles of law which by common consent govern the members of the international society in their relations with each other."⁵

The Holy See has been exchanging diplomats with other nations for over a thousand years. Through the years, the Papacy has developed an efficient diplomatic force. In this period of political and social unrest, the need of maintaining contact with such a news center is vital.

Mr. James Wilson, later an Associate Justice of the United States Supreme Court, stated, in the Constitutional Convention in Philadelphia, Pennsylvania, Tuesday, June 24, 1787:

"The Popes have generally been elected at very advanced periods, and yet in no case has a more steady or better concerted policy been pursued than in the Court of Rome."⁶

The clause of the Constitution, Article I, thereof, reading as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" is not a prohibition of the President in the field of foreign relations. Nor can it be made to read into a prohibition on the matter of the recognition of sovereign states. The fact that in the United States we have effected separation of church and state cannot be used to force other

⁴ Hackworth, *DIGEST OF INT. LAW*, Vol. 1, p. 47-48, and 1 Hyde, *INTERNATIONAL LAW*, 1922, p. 16-17.

⁵ Hackworth, *INT. LAW DIG.*, Vol. 1, p. 73, 74.

⁶ *DOC. HISTORY CONSTITUTION, U.S.A.*, Vol. 3, p. 418.

sovereign nations to comply with our local views. Even treaties must conform to the will of all the signatory powers. The United States is not alone in this world. American sovereignty extends only to our shore line and three miles beyond.

To say that recognition of the Holy See is in conflict with the "Spirit of the Constitution" is nonsense. Alexander Hamilton, when advised that the Constitution could be interpreted according to its "spirit", and therefore, possibly deprive the people of their liberties, said to the people ratifying the Constitution:

"The power of construing the laws according to the spirit of the Constitution will enable the court to mould them into whatever shape it may think proper. THIS IS AS UNPRECEDENTED as it is dangerous. In the first place, there is not a syllable in the plan under consideration which directly empowers the national courts to construe the laws according to the spirit of the Constitution."⁷

(If separation of Church and State were the test, then in the past recognition would have been refused Britain, Spain, Japan, Russia, Germany and France.)

However if, despite Alexander Hamilton, the Constitution is to be construed by its spirit, we must find the exchange of diplomats between the United States and the Vatican to be constitutional, for the United States exchanged diplomats and consular agents with the Holy See all through the period beginning in 1797 and ending with the year 1870. (The Vatican lost full freedom of action to Italy in 1871.)⁸

In a debate in the Senate, March 21, 1848, on the appropriation for a mission to the Papal States, Senator Calhoun raised the question of precedence. Senator Cass, answering Calhoun, stated that the minister of the Pope would hold seniority, "and were the Pope's minister here, every member of the Diplomatic Corps would bow to him and allow him to pass first." Senator Cass stated: "In Europe, by universal consent, the Pope's legate takes precedence of any member of the same grade in the Diplomatic Corps." Senator Calhoun agreed as to the custom in Europe, but said that in the United States seniority would go according to date of commission. The appropriation was passed.⁹

During the early years of the war between the United States and the Confederacy, the Pope sent a letter to the Archbishops of New York and New Orleans, urging all possible effort toward peace.

President Davis, of the Confederacy, was desperate for recognition of his government. Accordingly, he dispatched a Commissioner or Delegate to the Pope in 1863, thanking him for suggesting peace to his Archbishops. The Pope answered in a letter dated December 3, 1863, stating that "he was grateful *** to perceive that you and those people were animated with the same

⁷ *The Federalist*, No. 81; Modern Library, p. 523.

⁸ FOREIGN RELATIONS REP., Series 1, December, 1946.

⁹ Moore, INT. L. DIG., Vol. 4, p. 734-736.

feeling of peace and tranquility." The Confederate Commissioner held the letter to be a "positive recognition of the Confederate Government". "It will live", said Commissioner Mann, "forever in story as the production of the first potentate who formally recognized your official position and accorded to one of the diplomatic representatives of the Confederate States an audience in an established court palace like that of St. James or the Tuileries."¹⁰

When the Secretary of State of the Confederacy, Mr. Benjamin, read the letter, he maintained that as recognition of the Confederate States, the letter from the Pope was of little value. "It was only an inferential recognition, unconnected with political action or the regular establishment of diplomatic relations. The address to Mr. Davis as President of the Confederate States was merely a formula of courtesy to his correspondent, and not a political acknowledgment of the fact."¹¹

Mr. Benjamin's interpretation was correct, and the Papal Secretary of State, Cardinal Antonelli, so notified the United States Minister to the Papal States, Mr. King. The Cardinal held the letter to be free of all political design and was intended merely as an expression of his wishes for the restoration of peace to the people of the United States.¹²

At the outbreak of the war between the states, Great Britain and France, with unseemly haste, granted to the Confederacy the rights of "neutrality", to-wit, belligerency, thereby conceding that the Confederacy was entitled to the rights emanating out of the rules of "civilized warfare". The Confederates, so far as those countries were concerned, were not to be treated as "rebels". France went so far as to suggest mediation.¹³

Meantime, under the rights granted by "neutrality", the Confederacy contracted for the purchase of ships-of-war from private citizens of Great Britain and received delivery, less guns and ammunition, in 1862.¹⁴

Had the Pope then granted the Confederacy "full recognition", the Latin-American Republics and probably France and Spain as well, would have followed suit. In this event, the government of President Abraham Lincoln would have faced still more dangers. Since we then held normal diplomatic relations with the Holy See, that government was, of course, a sovereign power. If recognition was constitutional, then it will be constitutional once more should recognition be granted by President Truman in the near future, since under the "Lateran Treaty" the Holy See has full freedom of action.

¹⁰ Moore, *INT. L. DIG.*, Vol. 1, p. 210-212.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ Bemis, *A DIPLOMATIC HISTORY OF THE U.S.*, p. 371.

¹⁴ Bemis, *A DIPLOMATIC HISTORY OF THE U.S.*, p. 378.

Relations between states are conducted, normally, through duly accredited representatives. Every independent nation possesses the right of "legation", which is the right of a state to send and receive diplomatic envoys. This right is also accorded to part and semi-sovereign states.¹⁵

The United States, from its inception, recognized the Holy See in its temporal capacity. President Polk, in his Annual Message of December 7, 1847, said:

"The Secretary of State has submitted an estimate to defray the expenses of opening diplomatic relations with the Papal States. The interesting events now in progress in these states, as well as just regard to our commercial interests, have, in my opinion, rendered such a measure highly expedient."¹⁶

The above was full recognition of the sovereignty of the Papal States by the United States, as has been set forth in Moore's International Law Digest. This situation continued until the Papal States lost their sovereignty to the Kingdom of Italy in the years 1866-1870. Statesmen such as John Quincy Adams, Daniel Webster, Henry Clay and John Calhoun were all agreed on the matter of papal sovereignty in the early years of our Republic.¹⁷

By the Act of March 27, 1848, Congress made an appropriation for sending a charge d'affaires to the Papal States. In the instruction to this official there is contained the following passage, as set down by the then Secretary of State, Buchanan:

"There is one consideration which you ought always to keep in view in your intercourse with the Papal authorities, most, if not all, the governments which have diplomatic representatives at Rome, are connected with the Pope, as head of the Church. In this respect, the Government of the United States occupies an entirely different position. It possesses no power whatever over the question of religion. All denominations of Christians stand on the same footing in this country; and every man enjoys the inestimable right of worshipping his God according to the dictates of his own conscience. Your efforts will, therefore, be devoted exclusively to the cultivation of the most friendly civil relations with the Papal Government, and to the extension of the commerce between the two countries. You will carefully avoid even the appearance of interference in ecclesiastical questions, whether they relate to the United States or to any other portion of the world. It might be proper, should you deem it advisable, to make these views known, on some suitable occasion, to the Papal Government, so that there may be no mistake or misunderstanding on the subject."¹⁸

¹⁵ Hackworth, INT. LAW DIG., Vol. 1, p. 66-74, 1940 and 130, BR. AND FOR. STATE PAPERS, Vol. I, p. 791-799.

¹⁶ Moore, INT. LAW DIG., Vol. 1, p. 130, and Mr. Buchanan, Sec. of State, to Mr. Martin, April 5, 1848-MS Inst. Papal States, Vol. 1, p. 11.

¹⁷ Moore, INT. LAW DIG., 1, pp. 131 and 206.

¹⁸ *Ibid.*

Shortly thereafter Rome became disturbed politically. The Government of the United States, however, considering the speedy restoration of the Pope as highly probable, if not absolutely certain, instructed our charge d'affaires to withhold his letter of credance until he should receive specific directions as to the Minister of Foreign Affairs to whom it should be delivered.

In 1871 the House of Savoy took over control of a united Italy, and the Pope elected to become the "Prisoner of the Vatican". Nevertheless, the Holy See continued to hold many of the attributes of temporal power.

As of 1875, Moore's International Law Digest, a publication of the Government of the United States, Vol. 1, page 39, held the Holy See in the following light:

"The Pope although deprived of the territorial dominion which he formerly enjoyed, holds, as Sovereign Pontiff, and head of the Roman Catholic Church, an exceptional position. Though in default of territory, he is not a temporal sovereign, he is in many respects treated as such. He has the right of active and passive legation, and his envoys of the first class, his Apostolic Nuncios are specially privileged. Nevertheless, he does not make war and the conventions which he concludes with states are not called treaties but "concordats". His relations with the Kingdom of Italy are governed unilaterally by the Italian Law of May 13, 1871, called the "Law of Guarantees", against which Pius IX and Leo XIII have not ceased to protest."

Once the Pope had lost his liberty of action to the Government of Italy, the United States continued to hold that the Holy See still enjoyed certain temporal powers. In 1875, Secretary of State Fish notified our Minister to Spain as follows:

"With all such arrangements, this Government abstains from interference or criticism. It is the right of those powers to determine such questions for themselves, and when one of them at whose Court this Government has a representative, receives a representative from the Pope, of higher rank than that of the representative of the United States, it becomes the duty of the latter to observe towards the Pope's representative the same courtesies and formalities of the first visit prescribed by the conventional rules of intercourse and ceremony and of the precedence of diplomatic agents, which have been adopted and almost invariably acted upon for the last six years."¹⁹

The above ruling was a tacit admission by the United States of the Pope's temporal power, even in the days of his "captivity". It remained in force until the signing of the "Lateran Treaty" between the Holy See and Italy, February 11, 1929, when Italy and the Holy See agreed that the Pope thenceforth was to hold sovereign and exclusive jurisdiction over a specified area in Rome. (As of December 19, 1946, a sub-committee of the Italian Constituent Assembly recommended the renewal of the above "Lateran Treaty"). On March 26, 1947, the

¹⁹ Letters of Secretary of State Fish to Mr. Cushing, U. S. Minister to Spain, June 4, 1875, For. Rel. 1875, p. 1119.

treaty was incorporated into the new Italian Constitution. Vatican City was recognized as an independent city, with the Pope as its temporal ruler.²⁰

Recognition of foreign states lies with the President. Secretary of State Jefferson, under President Washington, wrote to Minister Morris, our then representative to France:

"It accords with our principles to acknowledge any government to be rightful when it is formed by the will of the nation, substantially declared. The late government was of this kind and was accordingly acknowledged by all branches of ours; so any alteration of it which shall be made by the nation, substantially declared, will doubtless be acknowledged in like manner. With such kind of government, any kind of business may be done." And: "So of France, her bloody revolutions, which came near dissolving the bonds of society, her revolutionary 'Directory', her counsel, her Emperor Napoleon, and all their official acts have been recognized by the other nations of Europe, and by the legitimate monarch of France, when restored, as the acts of France, and binding on her people."²¹

Later, in 1793, Secretary of State Jefferson notified our Minister Morris: "We surely cannot deny to any nation that right wherein our government is formed—that every nation may govern itself according to whatever form it pleases, and change these forms at its will, and that it may transact its business with foreign nations through whatever organ it thinks proper, whether king, convention, assembly, committee or president, or anything else it may choose. The will of the nation is the only thing essential to be regarded."²²

For a number of years now, the United States has recognized the Holy See as a neutralized state.

"An neutralized state means not only that the state has announced its intention to remain neutral in wars between other states within the ordinary acceptance of the term of neutrality, but also that it has accepted a special status for itself by becoming 'perpetually neutral' towards all other states."²³

The states held by the United States to be "neutralized" as of 1940 were the following: "Switzerland, Belgium, Luxemburg, Albania, the Holy See, Iceland and the Philippine Islands."²⁴

Present Status of Holy See in International Law.

As of 1940, the United States sent diplomatic agents to all of the above nations. This status was given the Holy See by reason of the fact that on February

²⁰ New York Times 3-26-47, p. 27.

²¹ Moore, INT. LAW DIG., Vol. 1, p. 120 (1792).

²² Sec. of State Jefferson to Minister Morris, Moore, INT. LAW DIG., Vol. 1, p. 120 (1793).

²³ Hackworth, INT. LAW DIG., Vol. 1, p. 66-74 (1940) and 130 BR. AND FOR. ST. PAPS., Vol. 1, p. 791-99.

²⁴ *Ibid.*

11, 1929, the Vatican and Italy entered into a treaty containing the provision "that the Vatican City shall be regarded as neutral and inviolable territory." The treaty reads in part as follows:

- Par. 2. "Italy recognizes the sovereignty of the Holy See in the International Domain as an attribute inherent in its nature.
- Par. 3. "Italy recognizes the full ownership and exclusive and absolute dominion and sovereign jurisdiction of the Holy See over the Vatican. The boundaries of the said city are indicated in the plan forming Annex 1 to the present treaty.
- Par. 4. "The sovereignty and exclusive jurisdiction over the Vatican City precludes any intervention therein, on the part of the Italian Government.
- Par. 9. "In accordance with the rules of International Law, all persons having permanent residence within the Vatican City shall be subject to the sovereignty of the Holy See.
- Par. 12. "Italy recognizes the right of the Holy See to active and passive legation in accordance with the general rules of International Law.
- Par. 24. "As regards the sovereignty appertaining to it in the international sphere, the Holy See declares that it desires to remain and will remain aloof from rivalries of a temporal nature between other states and from International Conferences convened to deal with them, unless the contending parties make a joint appeal to its mission of peace. In any event, the Holy See reserves the right to exercise its moral, spiritual influence. Consequently, the Vatican City shall always be regarded as neutral and inviolable territory."²⁵

The above treaty between the government of Italy and the Holy See restored to the Vatican all the rights of sovereignty lost in 1870. All the nations of the world, except the United States and Russia, have recognized the validity of the above treaty.

When the President, under the Constitution and international law, decides to recognize a foreign state, he does so, because he feels from the information that he alone receives, that such recognition is necessary and required for the good of the Union and in compliance with international law.

And so when President Franklin D. Roosevelt nominated Myron Taylor as his Personal Representative to the Holy See, with the rank of ambassador, both the President and his Representative were bound diplomatically only by the rule laid down by President Polk and his Secretary of State in the years 1847-1848.

"You will carefully avoid even the appearance of interference in ecclesiastical questions, whether these relate to the United States or to

²⁵ Hackworth, *DIG. OF INT. LAW*, Vol. 1, pp. 73-74.

any other portion of the world. It might be proper, should you deem it advisable, to make these views known, on some suitable occasion, to the Papal Government, so that there may be no mistake or misunderstanding on this subject."²⁶

In the United States, recognition of new governments has usually been accomplished by the President acting on his own responsibility. Thus, Secretary of State Hughes declared in a letter of August 13, 1921, to Representative Garner:

"The question of the recognition of a foreign government is essentially a domestic one for the United States, to be decided by the Executive."²⁷

Secretary of State Kellogg once asserted, in a letter to Senator Swanson:

"The President has absolute power to recognize any country."²⁸

It follows then that once the President of the United States had decided, from his many sources of information, that a situation has arisen in the Department of Foreign Affairs, that requires the presence of an American ambassador in the capital of a sovereign power, the appointment should be made forthwith. To withhold an ambassador at the time would amount to a clear disservice to the Union. The same rule must apply here as applies to the powers of the President in negotiating treaties:

"The Convention have done well, wrote John Jay, therefore, in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest. They who have turned their attention to the affairs of men must have perceived that there are tides in them; tides very irregular in their duration, strength, and direction, and seldom found to run twice exactly in the same manner or measure. To discern and to profit by these tides in national affairs is the business of those who preside over them; and they who have had much experience on this head inform us, that there frequently are occasions when days, nay, even hours, are precious. The loss of a battle, the death of a prince, the removal of a minister, or other circumstance intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either should be left in capacity to improve them."²⁹

The Holy See has been sending and receiving diplomatic agents since the beginning of present-day civilization. Long before the United States of America came into existence, the Vatican was held to be a sovereign power in international law, and therefore, endowed with sovereign rights. The United States

²⁶ Moore, *INT. LAW DIG.*, Vol. 1, p. 130.

²⁷ M.S. Dept. of State, File 812.00; 25133; Hackworth, Vol. 1, p. 161.

²⁸ *Ibid*, File 711.672/600A.

²⁹ John Jay: *The Federalist*; No. 64, Mod. Lib. Ed. pp. 419-420.

has so held many times in the past. The matter has become an accomplished fact in American diplomacy. International law classes the severance of diplomatic relations among non-amicable methods of procedure, pointedly implying dissatisfaction and protest. American history holds no record of the existence of non-amicable relations between the United States and the Holy See.

If we found it constitutional and lawful to exchange diplomats, consul generals and consular agents with the Vatican during the period 1797-1870, then it is constitutional to exchange diplomats today, for as to the question of recognition, international law has not changed. A contrary holding would admit as true the doctrine of nullification.

"Questions of power", wrote Chief Justice Marshall, "do not depend upon the degree to which it may be exercised; if it may be exercised at all, it may be exercised at the will of those in whose hands it is placed."⁸⁰

"Independence does not admit of degrees."⁸¹

Not only does the law, as cited above, hold the Papacy to be entitled to recognition as a sovereign nation, but in all probability the Holy See has been and is considered a sovereign power by the rule of "de facto Government", even as to the United States; witness the following:

"During the interim between the first effort of establishment of a new state and the recognition thereof by a sufficient number of already established states to admit it to the family of nations, there may be a de facto government which may or may not continue."⁸²

Today, the Holy See holds full and absolute recognition from all civilized nations of the world except Russia and the United States. Time after time the services of the Papacy have been utilized because it has been considered a sovereign power.

- (a) In 1885 Germany and Spain agreed to use the services of the Pope as mediator over the question of control over the Palau and Caroline Islands, and the decision of the Pope was accepted by both parties.⁸³
- (b) The first reliable intelligence received by the United States concerning the probability that Mussolini would throw Italy into World War II on the side of Hitler came from the Vatican to President Roosevelt through the office of our "Personal Representative" to the Papacy. The Pope requested President Roosevelt to intercede at once and he would take parallel action. Both parties followed through, but to no avail.⁸⁴

⁸⁰ *Brown v. Maryland*, 12 Wheaton 19.

⁸¹ "Westlake"—Moore, *INT. LAW DIG.*, Vol. 1, 18.

⁸² 22 *CYC.* 1711, Par. 2.

⁸³ Moore, *INT. LAW DIG.*, Vol. 7, pp. 6 and 7.

⁸⁴ Cordell Hull, "Memoirs", *New York Times*, 2-13-48, p. 23.

- (c) In the surrender of Italy to the Allies in World War II, the services of the British Minister to the Holy See were used in the negotiations held between General Eisenhower, for the United States, and Marshal Badoglio.³⁵
- (d) In 1945 the Japanese Government was constantly importuning the Vatican to act as mediator in bringing about peace between the United States and Japan. The Vatican transmitted the message "and made no recommendations of its own".³⁶

Only sovereign entities take "parallel" action. Mr. Hull, in his "Memoirs", gives four reasons for the appointment of Mr. Taylor to the Vatican:

- a. To give aid to European Catholic refugees.
- b. To secure the benefit of the knowledge held by the Vatican on conditions in Germany, France and Spain.
- c. To secure the aid of the Holy See in the making of a settlement of peace between the warring powers, and
- d. To secure from the Pope parallel action for peace.³⁷

All the nations of the world, saving only the United States and Russia, have granted to the Holy See the full rights of legation. Since the United States has taken action in international relations and in international law on parallel lines with the Vatican, then at the very least we have held the Holy See to be a "de facto" power. In the field of international law only equals take parallel action, and only sovereign powers mediate.

The United States places itself in an equivocal position when it consorts with the Vatican on terms of full equality to keep the peace by acting on parallel lines on occasion and at the same time endeavors to hold the consortium to be "morganatic" only.

The legal situation involved herein calls for a "DE JURE" status. "Recognition must not be deprived of the sifting processes of time."

³⁵ Butcher, MY THREE YEARS WITH GENERAL EISENHOWER, p. 391.

³⁶ Zacharias, SECRET MISSIONS, p. 364.

³⁷ Dept. of State Bulletin, Dec. 23, 1939.